

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2434-CR

Cir. Ct. No. 2011CF1201

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN M. JIMMERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Steven M. Jimmerson appeals a judgment convicting him of one count of attempted armed robbery with use of force. He also appeals an order denying his postconviction motion for a new trial. He argues that the circuit court erroneously exercised its discretion in admitting the

testimony of Detective Warren Allen about a witness's statement to police implicating him. We affirm.

¶2 A masked person with a gun, who was wearing all black, robbed a delivery person near his delivery truck parked outside a convenience store. Andrew Thurmond, a store employee, told the police that Jimmerson, whom he had known for many years, committed the robbery. During a trial to the court, however, Thurmond testified that he was not sure who committed the robbery. The State then called Detective Allen to testify about Thurmond's statement to the police the day of the robbery implicating Jimmerson. The circuit court found Jimmerson guilty.

¶3 Jimmerson argues that Detective Allen's testimony regarding the statement Thurmond gave to police immediately after the robbery should not have been admitted because Thurmond's testimony at trial was not inconsistent with what Thurmond initially told the police. We disagree.

¶4 A prior statement by a witness that is inconsistent with the witness's trial testimony is admissible because it is not hearsay. *See* WIS. STAT. § 908.01(4)(a)1. (2011-12).¹ Where an objection is made to admission of an out-of-court statement on the grounds that it is not, in fact, inconsistent with the witness's trial testimony, the circuit court must determine whether any "inconsistencies are apparent which would make the introduction of the otherwise cumulative testimony necessary to test the credibility or the recollection of the witness." *Virgil v. State*, 84 Wis.2d 166, 180, 267 N.W.2d 852 (1978). We

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

review a circuit court's decision admitting evidence for a misuse of discretion. *State v. Kandutsch*, 2011 WI 78, ¶24, 336 Wis. 2d 478, 799 N.W.2d 865.

¶5 There were material inconsistencies between Thurmond's trial testimony and his initial statement to police. First, Thurmond testified at trial that it was *his theory* that Jimmerson might do something wrong to get money because Jimmerson had been in the store shortly before the robbery joking around with another customer about needing money; however, Thurmond said he never actually heard Jimmerson *say* that he intended to rob someone. In contrast, Detective Allen testified that Thurmond told him on the day of the robbery that Jimmerson said he was going to "get somebody" when he was in the store, which Thurmond understood to mean that Jimmerson was going to rob someone.

¶6 Second, Thurmond testified at trial that he was not sure who the robber was. He said that he initially told the police it was Jimmerson because he encountered a masked man with a gun outside the store while taking out the garbage shortly before the robbery and heard what he thought was Jimmerson's voice say, "Earl watch out. It ain't for you."² Thurmond further testified at trial that he was later told by an acquaintance named Chris that Chris had been sitting in a car nearby that day and had shouted the warning, not the masked man. In contrast, Detective Allen testified that Thurmond told him that he saw Jimmerson near the store with a gun and a mask shortly after Jimmerson left the store and that it looked like Jimmerson was waiting to commit a robbery. Detective Allen testified that Thurmond said he knew who the masked man was because he had

² Earl is Thurmond's nickname.

known Jimmerson since he was nine years old and recognized his body shape, his voice, and his clothing.

¶7 The circuit court properly exercised its discretion in allowing Detective Allen to testify about Thurmond's statement to the police on the day of the robbery because there were material inconsistencies between Thurmond's trial testimony and his statement to the police. The primary issue here was identification because the robber wore a mask. Thurmond was confident in his identification of Jimmerson when he first talked to police, but back-pedaled significantly at trial. This is precisely the type of situation in which the prior statement of the witness is allowed under WIS. STAT. § 908.01(4)(a).³

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ Jimmerson also raises a claim of ineffective assistance of counsel. We need not address this claim because we addressed Jimmerson's claim of error on the merits; we did not conclude it was waived by counsel.

